# In the Supreme Court of the United States.

OCTOBER TERM, 1896.

THE UNITED STATES, APPELLANT,
*v.*
WONG KIM ARK. } No. 449.

**APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.**

## BRIEF FOR THE UNITED STATES.

Appellee filed his petition in the district court of the United States for the northern district of California, in which he alleged—

> That said Wong Kim Ark is imprisoned, detained, confined, and restrained of his liberty by John H. Wise, collector of customs at the port of San Francisco, and the captain of the steamship *Peking*.

That he was imprisoned and restrained of his liberty illegally under circumstances set out in the petition, and he prayed for a writ of habeas corpus to be directed to John H. Wise, collector of customs at the port of San Francisco, and the captain of the steamer *Peking*.

Subsequently, he filed a second petition, reciting more in detail the matters set forth in the former petition and prayed for a writ of habeas corpus, to be directed to John H. Wise, collector, etc., and to D. D. Stubbs, general manager of the Occidental and Oriental Steamship Company.

On the 11th of November, 1895, the United States, through Henry S. Foote, esq., United States attorney for the northern district of California, asked and obtained leave to intervene in the matter of the application for a writ of habeas corpus for reasons stated in the motion. (Rec., 9.)

The parties, by their counsel, entered into "an agreed statement of facts" (Rec., 10), which is as follows:

I.

That the said Wong Kim Ark was born in the year 1873, at No. 751 Sacramento street, in the city and county of San Francisco, State of California, United States of America, and that his father and mother were persons of Chinese descent and subjects of the Emperor of China, and that said Wong Kim Ark was and is a laborer.

II.

That at the time of his said birth his mother and father were domiciled residents of the United States and had established and enjoyed a permanent domicile and residence therein at said city and county of San Francisco, State aforesaid.

III.

That said father and mother of said Wong Kim Ark continued to reside and remain in the United States until the year 1890, when they departed for China.

IV.

That during all the time of their said residence in the United States, as domiciled residents therein, the said mother and father of said Wong Kim Ark were engaged in the prosecution of business and were never engaged in any diplomatic or official capacity under the Emperor of China.

V.

That ever since the birth of said Wong Kim Ark, at the time and place hereinbefore stated and stipulated, he has had but one residence, to wit, a residence in said State of California, in the United States of America, and that he has never changed or lost said residence or gained or acquired another residence, and there resided, claiming to be a citizen of the United States.

VI.

That in the year 1890 the said Wong Kim Ark departed for China upon a temporary visit and with the intention of returning to the United States and did return thereto on the 26th day of July, 1890, on the steamship *Gaelic*, and was permitted to enter the United States by the collector of customs upon the sole ground that he was a native-born citizen of the United States.

VII.

That after his said return the said Wong Kim Ark remained in the United States, claiming to be a citizen thereof, until the year 1894, when he again departed for China upon a temporary visit, and with the intention of returning to the United States, and did return thereto in the month of August, 1895, and applied to the collector of customs to be permitted to land, and that such application was denied upon the sole ground that said Wong Kim Ark was not a citizen of the United States.

VIII.

That said Wong Kim Ark has not, either by himself or his parents acting for him, ever renounced his allegiance to the United States, and that he has never done or committed any act or thing to exclude him therefrom.

From this statement of facts it appears that the parents of Wong Kim Ark returned to China in 1890, taking Wong Kim Ark with them, who was then an infant 17 years old. That Wong Kim Ark returned during the same year to the United States, but it does not appear as a fact that his parents returned with him, the inference from the "statement of facts" being that *they* did not return to the United States.

That again, in the year 1894, Wong Kim Ark departed for China upon a temporary visit and with the intention of returning to the United States, and did return thereto in the month of August, 1895.

It is not agreed as a fact that Wong Kim Ark was 21 years of age when he returned to the United States in August, 1895.

It is agreed that Wong Kim Ark was a *laborer*.

The question then presented for decision is—

Is a Chinese person, born in the United States of Chinese parents, who during his infancy returned to China, taking him with them, a citizen of the United States? It appearing that he returned alone during his infancy to the United States, remained there as a laborer for three years, when he departed for China with the intention of returning to the United States.

ARGUMENT.

The learned judge of the district court, in a very able and elaborately argued opinion, concluded that he was "constrained to follow the authority and law enunciated in this circuit," and accordingly held the detention of the petitioner to be illegal and ordered his discharge.

The industry and labors of the learned judge might perhaps render unnecessary any further discussion of the question in this brief. But the importance of a right decision by this court entitles it to all the lights, of however feeble ray, that can be cast upon its path.

The question has been presented, but has never been directly decided by this court.

Many decisions of inferior courts, Federal and State, many opinions of the Attorneys-General of the United States, and many expressions and rulings of the State Department deal directly with the question. And it must be admitted that so far as the decisions of the courts are concerned the majority of them are in accord with the decision of the district court of California in this case.

But we are justified in the opinion that these decisions will lose much of their force as authority from the consideration that they all rest upon one or both of two grounds:

*First*, in following as an authority, which they admit as controlling them, the opinion of Assistant Vice-Chancellor Sandford in *Lynch* v. *Clark*, 1 Sand. Ch. Rep., 583; and

*Second*, in assuming, as was done in that case, that the common-law doctrine of England applies and controls in this country.

We will endeavor to treat this question by considering—

What the common-law doctrine was.

Why and wherein it differed from the Continental or Roman doctrine.

Whether it was ever the doctrine of the United States.

What was the law of the United States prior to the adoption of the fourteenth amendment to the Constitution.

How, if at all, that amendment has affected this doctrine of law in the United States.

### WHAT THE COMMON-LAW DOCTRINE WAS.

The first and most obvious division of the people is into aliens and natural-born subjects. Natural-born subjects are such as are born within the dominions of the Crown of England; that is, within the ligeance, or, as it is generally called, the allegiance, of the King; and aliens, such as are born out of it. Allegiance is the tie, or *ligamen*, which binds the subject to the King in return for that protection which the King affords the subject. The thing itself,

or substantial part of it, is founded in reason and the nature of government; the name and the form are derived to us from our Gothic ancestors. Under the feudal system every owner of lands held them in subjection to some superior or lord, from whom or whose ancestors the tenant or vassal had received them; and there was a mutual trust or confidence subsisting between the lord and vassal that the lord should protect the vassal in the enjoyment of the territory he had granted him, and, on the other hand, that the vassal should be faithful to the lord and defend him against all his enemies. (Black. Com., book first, chap. 10, p. 367.)

The children of aliens born here in England are, generally speaking, natural-born subjects, and entitled to all the privileges of such. In which the constitution of France differs from ours, for there, by their *jus albinatus*, if a child be born of foreign parents it is an alien. (Ib., 374.)

For subsequent provisions by statute, see 1 Broom and Hadley's Commentaries, page 450 (1st London ed.).

The inflexible rule of the English law was broken by the treaty with the United States in 1783. Prior to the ratification of this treaty the colonists in America were English subjects, owing allegiance to the English King. The common law and the statute law in England were in full force in the colonies. By this treaty the English King acknowledged the several colonies forming the United States, to be free, sovereign, and independent States, and treated with them as such, and relinquished all claim to the government, proprietary and territorial rights of the same and every part thereof.

In *Calvin's Case* (4 Coke, 1) the question was, whether Robert Calvin, the plaintiff, being born in Scotland since

the Crown of England descended to His Majesty, be an alien born, and consequently disabled to bring any real or personal action for any lands within the realm of England. The judgment of the court was that Calvin was not an alien born, the court, according to the report of the case, holding that—

> An alien is a subject that is born out of the ligeance of the King and under the ligeance of another, and can have no real or personal action for or concerning land. That ligeance is a true and faithful obedience of the subject due to his sovereign. This ligeance and obedience is an instance inseparable to every subject, for as soon as he is born he oweth by birthright ligeance and obedience to his sovereign.

Natural ligeance, "due by nature and birthright," is distinguished from "*ligentia acquisita*, or denization."

The doctrine of the report being that birth within the dominion of England establishes the allegiance, and this allegiance once established can never be surrendered or discarded.

THERE IS NO COMMON LAW OF THE UNITED STATES.

There can be no common law of the United States. The Federal Government is composed of sovereign and independent States, each of which may have its common-law statutes, local usages, and customs. There is no principle which pervades the Union and has the authority of law that is not embodied in the Constitution or statutes of the United States. The common law could be made a part of our Federal system only by legislative adoption. If a common-law right is asserted in a United

States court, such court must look to the State in which the case arose.

*Wheaton* v. *Peters* (8 Pet., 59).
*Kendall* v. *United States* (12 Pet., 524).
*Lorman* v. *Clark* (2 McLane, 568).
*Penna.* v. *Wheeling, &c. Bridge Co.* (13 How., 564).
*United States* v. *Garlinghouse* (4 Benedict, 194).
*Smith* v. *Alabama* (124 U. S., 465).
*United States* v. *Britton* (108 U. S., 199).
*Tennessee* v. *Davis* (100 U. S., 257).
*United States* v. *Eaton* (144 U. S., 677).

WHY AND WHEREIN IT DIFFERS FROM THE CONTINENTAL OR ROMAN DOCTRINE.

Under a custom which was formerly so general as to be called by an eminent French authority "The Rule of Europe," and of which traces still exist in the legislation of many countries, the nationality of children born of the subjects of one power within the territory of another was dictated by the place of their birth, in the eye, at least, of the state of which they were natives. The rule was the natural outcome of the intimate connection in feudalism between the individual and the soil upon which he lived; but it survived the ideas with which it was originally connected, and probably until the establishment of the code Napoleon by France no nation regarded the children of foreigners born upon its territory as aliens. In that code, however, a principle was applied in favor of strangers by which states had long been induced to guide themselves in dealing with their own subjects, owing to the inconvenience of looking upon the children of natives born abroad as foreigners. It was provided that a child should follow the nationality of its parents. (Hall's International Law, 234 (London 1895).)

> To what nation a person belongs is by the laws of all nations closely dependent on descent; it is almost an universal rule that the citizenship of the parents determines it—that of the father where children are lawful, and where they are bastards; that of their mother, without regard to the place of their birth; and that must necessarily be recognized as the correct canon, since nationality is in its essence dependent on descent. (International Law, Private and Criminal, by Dr. L. Bar (University of Gottingen), sec. 31.)

Vattel directly antagonizes the English rule by stating that—

> The true bond which connects the child with the body politic is not the matter of an inanimate piece of land, but the moral relations of his parentage.

And, again, he adds:

> The place of birth produces no change in the rule that children follow the condition of their fathers, for it is not naturally the place of birth that gives rights, but extraction. (See The Law of Citizenship, Webster, p. 101 et seq.; Morse on Citizenship, part 1, passim.)

Savigny, in his Private International Law (p. 100, 2d London ed.), says:

> Children born in wedlock have unquestionably from their birth the same domicile as their father; they may, however, afterwards freely choose another domicile when their original ceases.

Lord Mackenzie, in his Roman Law (p. 84), says:

> Citizenship was acquired, first, by birth. In a lawful marriage the child followed the condition of the father and became a citizen, if the father was so, at the time of conception.

> The national character of an individual is determined either by the fact of birth or the ties of parentage—and this constitutes the *nationality of origin*—or by naturalization in another country, which creates nationality by acquisition. (Morse on Citizenship, sec. 16, citing many writers on Roman and international law.)

WHAT WAS THE LAW OF THE UNITED STATES PRIOR TO THE ADOPTION OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION?

In *Amy* v. *Smith* (Littell, Ky., 327), the plaintiff, a negro woman, brought an action of trespass, alleging that she was illegally held and imprisoned by the defendant as his slave. There was verdict and judgment for the defendant. On writ of error the case came, in June, 1822, before the court of appeals of Kentucky. In its opinion (p. 332) the court said:

> Before we can determine whether she was a citizen or not of either of those States, it is necessary to ascertain what it is that constitutes a citizen. In England birth in the country was alone sufficient to make anyone a subject. Even a villain or a slave, born within the King's allegiance, is, according to the principles of the common law, a subject, but it never can be admitted that he is a citizen. One may no doubt be a citizen by birth, as well as a subject, but subject and citizen are evidently words of different import, and it indisputably requires something more to make a man a citizen than it does a subject. It is, in fact, not the place of a man's birth, but the rights and privileges he may be entitled to enjoy which make him a citizen. The term "citizen" is derived from the Latin word *civis*, and

> its primary sense signifies one who is vested with the freedom and privileges of a city. * * * No one can, therefore, in the correct sense of the term, be a citizen of a State who is not entitled, upon the terms prescribed by the institutions of the State, to all the rights and privileges conferred by those institutions upon the highest class of society. * * * He may not only not be in the actual enjoyment of those rights and privileges, but he may even not possess those qualifications of property, of age, or of residence which most of the States prescribe as requisites to the enjoyment of some of their highest privileges and immunities, and yet be a citizen; but to be a citizen *it is* necessary that he should be *entitled* to the enjoyment of those privileges and immunities upon the same terms upon which they are conferred upon other citizens; and unless he is so entitled he can not in the proper sense of the term be a citizen.

In *Minor* v. *Happersett* (21 Wall., 166), Chief Justice Waite, delivering the opinion of the court, said:

> Looking at the Constitution itself, we find that it was ordained and established by "the people of the United States;" and then, going further back, we find that these were the people of the several States that had before dissolved the political bonds which connected them with Great Britain and assumed a separate and equal station among the powers of the earth, and that had by articles of confederation and perpetual union, in which they took the name of "the United States of America," entered into a firm league of friendship with each other for their common defense, the security of their liberties, and their mutual and general welfare, binding themselves to assist each other against all force offered to or attack

made upon them on account of religion, sovereignty, trade, or any other pretense whatever.

* * * * *

The Constitution does not in words say who shall be natural-born citizens. Resort must be had elsewhere to ascertain that. At common law, with the nomenclature with which the framers of the Constitution were familiar, it was never doubted that all children born in a country of parents who were its citizens became themselves, upon their birth, citizens also. These were natives or natural-born citizens as distinguished from aliens or foreigners. Some authorities go further and include as citizens children born within the jurisdiction without reference to the citizenship of their parents. As to this class there have been doubts, but never as to the first. For the purposes of this case, it is not necessary to solve these doubts.

In *United States* v. *Cruikshank* (92 U. S., 549) the court, through Chief Justice Waite, said:

Citizens are the members of the political community to which they belong. They are the people who compose the community and who, in their associated capacity, have established or submitted themselves to the dominion of a government for the promotion of their general welfare and the protection of their individual as well as their collective rights.

The Federal Constitution contained no definition of citizenship of the United States. It contained the provision that "The citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States;" but this was simply a declaration that whatever rights any State might grant to its own citizens

should be enjoyed equally by the citizens of each of the other States within the jurisdiction of the State granting such rights.

The phrase "citizen of the United States" occurs in the Constitution in the two sections of Article I relating to the qualifications of Senator and Representative in Congress; and, also, in section 1 of Article II, providing that "no person except a natural-born citizen, or a citizen of the United States at the time of the adoption of this Constitution, shall be eligible to the office of President."

The designation "United States" was never employed in the early days of the Republic to express a *simple*, but always a compound, political body. They were never referred to in the singular, but always in the plural number. And where the expression "citizen of the United States" occurs in the Constitution, it refers to the citizens of the several States constituting the United States. There is no reason to suppose that the idea of citizenship apart from the State, and referring to the General Government—that is, national citizenship—ever existed in the mind of anyone in those days.

True, the power was granted to Congress "to establish an uniform rule of naturalization." But that was because to the Federal Government alone belonged the power of treating or dealing with foreigners as such. It rendered a foreigner eligible to citizenship, but it did not make him a citizen.

Judge Story wrote in his commentaries:

> It has always been well understood among jurists in this country that the citizens of each State con-

stitute the body politic of each community called the people of the States, and that the citizens of each State in the Union are *ipso facto* citizens of the United States.

Mr. Calhoun, in his speech on the force bill in 1833, said:

> If by a citizen of the United States he (Senator Clayton, of Delaware) means a citizen at large, one whose citizenship extends to the entire geographical limits of the country, without having a local citizenship in some State or Territory, a sort of citizen of the world, all I have to say is, that such a citizen would be a perfect nondescript; that not a single individual of this description can be found in the entire mass of our population. Notwithstanding all the pomp and display of eloquence on the occasion, every citizen is a citizen of some State or Territory, and as such, under an express provision of the Constitution, is entitled to all privileges and immunities of citizens in the several States; and it is in this and no other sense that we are citizens of the United States.

In his dissenting opinion in the Dred Scott Case, Mr. Justice Curtis said (19 How., 577):

> The Constitution having recognized the rule that persons born within the several States are citizens of the United States, one of four things must be true:
>
> First, that the Constitution itself has described what native-born persons shall or shall not be citizens of the United States; or,
>
> Second, that it has empowered Congress to do so; or,
>
> Third, that all free persons born within the several States are citizens of the United States; or,

Fourth, that it is left to each State to determine what free persons born within its limits shall be citizens of such State and *thereby* be citizens of the United States.

* * * * *

The last of these alternatives, in my judgment, contains the truth.

Undoubtedly, as has already been said, it is a principle of public law, recognized by the Constitution itself, that birth on the soil of a country both creates the duties and confers the rights of citizenship. But it must be remembered that though the Constitution was to form a government, and under it the United States of America were to be one sovereign nation, to which loyalty and obedience on the one side and from which protection and privileges on the other, would be due, yet the several sovereign States, whose people were the citizens, were not only to continue in existence, but with powers unimpaired, except so far as they were granted by the people to the National Government. Among the powers unquestionably possessed by the several States was that of determining what persons should and what persons should not be citizens. * * *

(P. 582:) The Constitution has left to the States the determination what persons born within their respective limits shall acquire by birth citizenship of the United States; it has not left to them any power to prescribe any rule for the removal of the disabilities of alienage. This power is exclusively in Congress.

The idea of citizenship of the United States, apart from citizenship of a State, was the offspring of that unhappy period of rabid rage and malevolent zeal when corrupt ignorance and debauched patriotism held high carnival

in the halls of Congress, and a "reconstruction" of States which had contributed largely to the construction of the United States remained an object of unremitting endeavor until the treasuries and the credit of those States had become exhausted and the plunder upon which that form of patriotism was nourished no longer remained.

The Supreme Court of the United States, in the Slaughterhouse Cases, has, we trust, forever shattered the idol of national citizenship which the "reconstruction Congress" had placed upon so lofty a pedestal. The opinion of Mr. Justice Miller, while fully recognizing citizenship of the United States, has brought out in clear, strong lines some, at least, of the features of citizenship of the States as contemplated by the Constitution, recognizing it as a fact that a person can be a citizen of the United States and at the same time not be a citizen of a State. Is the converse of that proposition true? Can a person be a citizen of a State and at the same time not be a citizen of the United States?

Mr. Benjamin Abbott, in his Law Dictionary (vol. 1, p. 226), says:

> If citizenship can be forfeited; if a loss of citizenship may be imposed by a statute as a penalty for an offense, it would seem that, under possible legislation, a person convicted under an act of Congress imposing disfranchisement might cease to be a citizen of the Union; yet, because the offense was against the United States alone, or because there was no corresponding penal law in his State, he might be deemed to continue a citizen of the State.

So it is within the power of a State to grant to an alien, residing within her borders, all the rights and privileges enjoyed by her own citizens, so far as these are under the control of that State.

Would not such an alien become a citizen of that State, yet not a citizen of the United States?

Chief Justice Taney, in the *Dred Scott* Case, said:

> We must not confound the rights of citizenship which a State may confer within its own limits and the rights of citizenship as a member of the Union. * * * He may have all the rights and privileges of a citizen of a State and yet not be entitled to the rights and privileges of a citizen in any other State. * * * Each State may * * * confer them upon an alien, or anyone it thinks proper, or upon any class or description of persons, yet he would not be a citizen in the sense in which that word is used in the Constitution of the United States, nor entitled to sue as such in one of its courts, nor to the privileges and immunities of a citizen in any of the other States.

Mr. John Norton Pomeroy, in his Constitutional Law (sec. 390), says:

> While it is settled, then, upon principle, authority, and continuous practice, that the Congress of the United States has exclusive authority to make rules for naturalization, it must not be understood that the States are deprived of all jurisdiction to legislate respecting the rights and duties of aliens. They permit or forbid persons of alien birth to hold, acquire, or transmit property, to vote at State or national elections, etc. These capacities do not belong to United States citizens as such. Congress would transgress its powers were it to assume to make rules upon these subjects.

In 2d Kent's Commentaries (14th ed.) it is said in the text, "Natives are all persons born within the jurisdiction and allegiance of the United States." And in a note by the author it is added:

> This is the rule of the common law without any regard or reference to the political condition or allegiance of their parents, with the exception of the children of ambassadors, who are in theory born within the allegiance of the foreign power they represent. (*Calvin's Case*, 7 Coke, 1; *Lynch* v. *Clarke*, 1 Sanford's Ch., 584–639.) In this last case the doctrine relative to the distinction between aliens and citizens in the jurisprudence of the United States was extensively and learnedly discussed, and it was adjudged that the subject of alienage under our national compact was a *national* subject, and that the law on this subject, which prevailed in all the United States, became the common law of the United States when the union of the States was consummated, and the general rule above stated is consequently the governing principle or common law of the United States and not of the individual States separately considered.

In *Lynch* v. *Clarke* the bill was brought by Patrick Lynch against John Clarke and Julia Lynch for certain real estate in the State of New York. The facts in brief were that John Clarke and Thomas Lynch were partners in New York from 1808 to 1833, when Thomas Lynch died. They had bought valuable real estate, paid for with partnership funds, the deeds to all of which were taken to Clarke alone. Clarke in his answer insisted, first, that the purchases were made for his exclusive use and benefit, and had been paid for with money loaned to

him by the partnership firm; secondly, that Julia Lynch was a citizen of the United States and inherited all the real estate of Thomas Lynch. The case turned upon the citizenship of Julia Lynch. Her parents were British subjects, domiciled in Ireland. They came to this country in 1815, remained till the summer of 1819, and then returned to Ireland. Julia was born in the city of New York in the spring of 1819. Her parents took her with them on their return to Ireland, and she remained there till after the death of Thomas Lynch. Julia came from Ireland to this country with her uncle Bernard in 1834. She was then about 15 years of age.

The argument of counsel and the opinion of the chancellor display a wealth of learning and a thoroughness and extent of argument which might seem to have exhausted the subject and the methods of its treatment.

Upon the statement of the case one naturally inquires why the range of inquiry and discussion extended beyond the constitution and laws of the State of New York, by which the law of the inheritance of real estate in that jurisdiction would seem to have been governed.

But such inquiry is met in the very outset of the chancellor's opinion, as follows:

> It is undoubtedly true that the right to real estate by descent in this State must be governed by the municipal law of the State. And by the law of this State, which in this respect is the common law, aliens can not inherit land. But this does not relieve the case from its difficulty, because we have no State law which in express terms declares who are aliens or who are citizens, either in general or

> for the purpose of inheriting land. It thus becomes necessary to inquire who is an alien according to the laws which must control that subject in this State. No one can dispute the power of this or any other State in the Union to regulate the subject of inheritance. The State legislatures may enable aliens to hold and inherit lands unconditionally in their respective States. But where they have omitted to legislate and the common law disability is left to operate against aliens, the right to inherit, when disputed on this ground, must be determined on some general principle or rule of law which ascertains who are aliens and who are citizens.

The learned chancellor then argues that the right of citizenship is "not a matter of mere State concern. It is necessarily a *national right* and character. It appertains to us, not in respect to the State of New York, but in respect of the United States."

He then argues and decides that the power to legislate as to aliens—to confer upon them the rights of citizenship—was given to Congress; and—

> That such power was intended to be and necessarily must be exclusive. * * * And whether or not the Constitution enabled Congress to declare that the children born here of alien parents, who never manifested an intention to become citizens, are aliens or are citizens—it is clear that the decision of that question must be by some general rule of law applicable to and affecting our whole nation. It must be determined by what may be called the *national law* as contradistinguished from the local law of the several States. It is purely a matter of national jurisprudence and not of State municipal law.

He then passes to the consideration of the question, "What is the national law of the United States on this subject?" and concludes that "the common law prevails in the United States as a system of national jurisprudence," and (p. 663)—

> Upon principle, therefore, I can entertain no doubt but that, by the law of the United States, every person born within the dominions and allegiance of the United States, whatever were the situation of his parents, is a natural-born citizen. * * *
>
> No one asks whether his parents were citizens or were foreigners. It is enough that *he was born here*, whatever were the *status* of his parents.

Before undertaking an inquiry as to the correctness of the decision in this case it may be well to recognize the extent of the influence which it has exercised in the executive and judicial departments of the Government.

On July 18, 1859, Mr. J. S. Black, in reply to a question from Mr. Cass, Secretary of State, said:

> That a free white person born in this country of foreign parents is a citizen of the United States. (*Lynch* v. *Clarke et al.*, 1 Sandf. Ch. R., 583; 9 Op. Atty. Genl., 373.)

No other reason or authority is given for this opinion.

In September, 1862, to a question submitted to Mr. Bates by Mr. Seward, Secretary of State, as to "whether a child born in the United States whose parents are aliens who have never been naturalized can without naturalization be considered a citizen of the United State," the Attorney-General was—

> Quite clear in the opinion that children born in the United States of alien parents who have never

> been naturalized are native-born citizens of the United States and of course do not require the formality of naturalization to entitle them to the rights and privileges of such citizenship.

He said he might sustain this opinion by a reference to the common law, to the commentators on our Constitution, and to the decisions of many of our national and State courts; but he forbears, because "all this has been well done by Assistant Vice-Chancellor Sandford in the case of *Lynch* v. *Clarke*" (10 Op. Atty. Gen'l., 328, 329).

In September, 1884, in the United States circuit court for the district of California, *Look Tin Sing* filed his petition for habeas corpus, setting forth that he was born in California in 1870; that he went to China in 1879, and returned to the port of San Francisco in September, 1884; that he is the son of Chinese parents who are and always have been subjects of the Emperor of China; that his father is a merchant in California and had sent petitioner to China, but with the intention that he should return to this country; that petitioner is without the certificate required by the acts of 1882 and 1884, and for that reason the United States officers prohibit his landing in the United States and illegally detained him on board vessel. The case was heard before Mr. Justice Field and Judges Sawyer and Sabin. The opinion was delivered by Mr. Justice Field. (10 Saw., 354.)

The learned justice, after stating that—

> The English doctrine of perpetual and unchangeable allegiance to the government of one's birth attending the subject wherever he goes has never taken root in this country, although there are judi-

> cial dicta that a citizen can not renounce his allegiance to the United States without permission of the Government, etc.

and that this was the opinion of Chancellor Kent when he published his commentaries, concludes, that the words in the fourteenth amendment "subject to the jurisdiction thereof" do not exclude the petitioner from being a citizen; "he is not within any of the classes of persons excepted from citizenship, and the jurisdiction of the United States over him at the time of his birth was exclusive of that of any other country. * * * This subject was elaborately considered by Assistant Vice-Chancellor Sandford in *Lynch* v. *Clarke* (1 Sandf., 583)."

In 1888 the case of *Chin King* came before the circuit court of the district of Oregon. (35 Fed. Rep., 354.) Judge Deady, in discharging the prisoner from custody, said:

> By the common law, a child born within the allegiance—the jurisdiction—of the United States is born a subject or citizen thereof, without reference to the political status or condition of its parents. (*McKay* v. *Campbell*, 2 Saw., 118; *Look Tin Sing*, 10 Saw., 353; 21 Fed. Rep., 905; *Lynch* v. *Clarke*, 1 Sandf. Ch., 583.)

After commenting approvingly upon the opinion of Chancellor Sandford and the opinion of Justice Field in 10 Sawyer, the learned judge concludes:

> However, in my judgment, a father can not deprive his minor child of the status of American citizenship impressed upon it by the circumstances of its birth under the Constitution and within the jurisdiction of the United States.

The same question came again before the same judge on October 10, 1888, in *Yung Sing Hee* (36 Fed Rep., 437), when, referring to the same cases, he said:

> On this state of facts both by the common law and the fourteenth amendment the petitioner is an American citizen and is entitled to come and go within the United States as any other such citizen. She was born within or subject to the jurisdiction of the United States, and is therefore a citizen thereof.

And then, referring to the legislation prohibiting the immigration of Chinese laborers, he adds:

> So harsh and unjust a measure as this concerning the intercourse between friendly nations maintaining diplomatic relations is something unprecedented in this age of the world and can only be accounted for by the fact that a Presidential election is pending, in which each political party is trying to outbid the other for the "sand lot" vote of the Pacific Coast and particularly for that of San Francisco.

At the same time the case of *Wang Gan* (36 F. R., 553) came before Judge Sawyer, who decided it in accordance with, and, as he states, in consequence of, the decision of Justice Field in 10 Sawyer.

In June, 1895, the question came before the supreme court of New Jersey in *Benny* v. *O'Brien*, reported at large, 32 Atlantic Rep., 696. The court, through Van Syckel, J., after citing the case of *Lynch* v. *Clarke*, 1 Sandf., 583, and *Look Tin Sing*, 21 F. R., 905, and referring to other cases, concludes:

> Persons intended to be excepted are only those born in this country of foreign parents, *who are*

*temporarily traveling here*, and children born of persons resident here in the diplomatic service of foreign governments.

[Here is introduced for the first time a new element in the judgments upon this question, to wit, that a child born within the jurisdiction of the United States of "foreign parents who are temporarily traveling here" is not a citizen of the United States because of the *temporary residence* of the parents; whether a "temporary residence" depends upon the *animus revertendi* of the parents or upon the mere length of their stay in this country, does not appear. It is a fact of which the court may take judicial notice that *all* Chinese persons, as a rule, are but temporary residents of this country; they come and remain here, always intending to return.]

To the same effect have been the opinions and instructions from the State Department. On June 6, 1854, Mr. Marcy, Secretary of State, wrote to Mr. Mason, minister to France:

> In reply to the inquiry which is made by you in the same letter, whether the "children of foreign parents *born in the United States*, but brought to the country of which the father is a subject and continuing to reside within the jurisdiction of their father's country, are entitled to protection as citizens of the United States," I have to observe that it is presumed that according to the common law any person born in the United States, unless he be born in one of the foreign legations therein, may be considered a citizen thereof until he formally renounces his citizenship. There is not, however, any United States statute containing a provision upon this subject, nor, so far as I am aware, has there been any judicial decision in regard to it.

April 14, 1873, Mr. Fish to Mr. Ellis.

> So far as concerns our own local law, a child born in the United States to a British subject is a citizen of the United States.

February 16, 1877, Mr. Fish writes to Mr. Cushing:

> The minor child of a Spaniard, born in the United States, and while in the United States, or in any other country than Spain, is a citizen of the United States. "The United States has, however, recognized the principle that persons although entitled to be deemed citizens by its laws may also by the law of some other country be held to allegiance in that country."

November 15, 1881, Mr. Blaine to Mr. O'Neill:

> The child born to an alien in the United States loses its citizenship on leaving the United States and returning to its parents' allegiance.

In November, 1885, the case of *Richard Greisser* was the subject of correspondence between Mr. Bayard and Mr. Winchester, minister to Switzerland. Greisser was born in 1867 in the State of Ohio. His father was a German subject domiciled in Germany. The son left this country with his mother when he was under 2 years old and joined his father in Germany, where he had previously returned.

He applied for a passport to this country. Mr. Bayard said:

> Richard Greisser was no doubt born in the United States, but he was on his birth "subject to a foreign power," and "not subject to the jurisdiction of the United States." He was not, therefore, under the statute and the Constitution a citizen of the United States by birth, and it is not pretended that he has any other title to citizenship.

The foregoing extracts are all taken from 2 Wharton's International Law Digest (sec. 183).

We have seen that the opinions of the Attorneys-General, the decisions of the Federal and State courts, and, up to 1885, the rulings of the State Department all concurred in the view that birth in the United States conferred citizenship, and that this view was founded on the notion that the common-law doctrine of allegiance obtained in this country and, also, on the authority of the decision of Chancellor Sandford in *Lynch* v. *Clarke*.

THE CASE OF LYNCH *v.* CLARKE (1 SANDFORD'S CHANCERY 584), CONSIDERED.

It is worthy of remark that the supreme court of the State of New York has somewhat impaired the force of that decision as authority in that State, by a significant query.

The case of *Munro* v. *Merchant* (26 Barb. Sup. Ct. Rep., 400) was decided in January, 1858; it presented the same question that arose in *Lynch* v. *Clarke*. Judge Allen, speaking for the court, said:

> In *Lynch* v. *Clarke* (1 Sandf., 583), the question was precisely as here, whether a child born in the city of New York, of alien parents, during their temporary sojourn there, was a native-born citizen or an alien; and the conclusion was that, being born within the dominion and allegiance of the United States, he was a native-born citizen, whatever was the situation of the parents at the time of the birth. That case, *if it be law*, would seem to be decisive of the present question.

The chancellor holds that the right of Julia Lynch to inherit as the heir of Thomas Lynch must be determined

"by the state of allegiance existing at his death when the descent was cast"—that it "depends upon her alienage or citizenship at the time of her departure from this country in 1819." That at common law Julia, by virtue of her birth alone, became a citizen of the United States. That because the State of New York, where the land lay, had omitted to define by legislation who were aliens and to authorize aliens to hold and inherit lands unconditionally, that the common law disability is left to operate against aliens and "the right to inherit when disputed on this ground must be determined on some *general principle, or rule of law*, which ascertains who are aliens and who are citizens."

He holds "That this general principle is not to be obtained from the local or municipal law of the State of New York." That the right of citizenship "is necessarily a *national right* and character." That "as citizens we owe a particular allegiance to the sovereignty of our own State and a general allegiance to the confederated sovereignty of the United States." That "it is evident that the subject of alienage must be controlled by the general and not by the local allegiance." That "the right of citizenship in its enlarged sense was, after the adoption of the Constitution, not only a national right, but from the nature of the case it must from thenceforth be governed by the law of the whole nation and the acts of the National Legislature."

These quotations are made here thus full to show that the foundation of the chancellor's opinion was that although the land lay within the jurisdiction of the State of New York, and the single question was whether a

certain person could inherit land, that, because a question was raised as to whether that person was an alien or a citizen, that resort must be had, not to the laws of the State of New York, but to the laws of some other jurisdiction, elsewhere in this opinion called "national law," to ascertain and determine this question of inheritance, as though it were possible for any Federal law, or United States law, or "national law," written or unwritten, to determine a question of inheritance in one of the States. He insists that in Congress alone is the exclusive power of determining who are and who are not citizens. He ignores, if he does not repel, the idea that one may be a citizen of the United States and yet not a citizen of any State in the Union. That as a citizen of the United States he may be entitled to the enjoyment of certain rights and privileges but may be wholly debarred from participation in many of the most valued rights and privileges enjoyed by citizens of the States.

In the *Slaughterhouse Cases* (16 Wall., 73), Mr. Justice Miller, delivering the opinion of the court, said:

> The next observation is more important in view of the arguments of counsel in the present case. It is, that the distinction between citizenship of the United States and citizenship of a State is clearly recognized and established. Not only may a man be a citizen of the United States without being a citizen of a State, but an important element is necessary to convert the former into the latter. He must reside within the State to make him a citizen of it, but it is only necessary that he should be born or naturalized in the United States to be a citizen of the Union.

> It is quite clear, then, that there is a citizenship of the United States and a citizenship of a State, which are distinct from each other and which depend upon different characteristics or circumstances in the individual.

Before the *Act of April 9, 1866* (14 St., p. 27), the United States had never defined citizenship.

The United States have no statute of descents and no laws of inheritance.

In *United States* v. *Fox* (94 U. S., 320), this court said:

> It is an established principle of law everywhere recognized, arising from the necessity of the case, that the disposition of immovable property, whether by deed, descent, or any other mode, is exclusively subject to the government within whose jurisdiction the property is situated. (*McCormick* v. *Sullivant*, 10 Wheat., 202.) The power of the State in this respect follows from her sovereignty within her limits as to all matters over which jurisdiction has not been expressly or by necessary implication transferred to the Federal Government. The title and modes of disposition of real property within the State, whether *inter vivos* or testamentary, are not matters placed under the control of Federal authority. Such control would be foreign to the purposes for which the Federal Government was created and would seriously embarrass the landed interests of the State.

Yet the learned chancellor rested his judgment in this case on the proposition that the question of inheritance of lands in the State of New York must depend exclusively on the Federal law. He concludes (p. 646):

> * * * it is clear that the decision of that question must be by some general rule of law applicable to and affecting our whole nation. It must be

> determined by what must be called the *national law* as contradistinguished from the local law of the several States. It is purely a matter of national jurisprudence and not of State municipal law.

He next passes to the inquiry, "What is the national law of the United States on this subject?" and concludes (p. 655):

> It is a necessary consequence from what I have stated that the law which had prevailed on this subject in all the States became the governing principle or common law of the United States.

He holds, contrary to the doctrine announced in the numerous cases hereinbefore cited, that the common law, without adoption in express terms by the Constitution or statutes of the United States, yet obtains and prevails here as a "national law."

Assuming that before the adoption of the fourteenth amendment there was such a thing as "a citizen of the United States," as distinguished from "citizens of the several States," and that the State of New York had adopted the common law of England as part of her jurisprudence, but had omitted to define by legislation who should be citizens of that State, is it true, as announced by Chancellor Sandford (p. 644) as the corner stone of his decision, that—

> The application of any law of this State, written or unwritten, to the right of citizenship would conflict with the reason of the thing as a matter of national concern and with the powers of Congress under the Constitution. Citizenship, as I have shown, is a political right which stands not upon the

municipal law of any one State, but upon the more general principles of national law. It constitutes national character, not mere territorial designation.

This court had declared, in the *Slaughter House Cases* (16 Wall., 73), "that there is a citizenship of the United States and a citizenship of a State, which are distinct from each other and which depend upon different characteristics or circumstances in the individual."

And it had also declared, in *United States* v. *Fox, supra*, "that the disposition of immovable property by deed, descent, or any other mode, is *exclusively* subject to the government within whose jurisdiction the property is situated."

And yet the learned chancellor held that this immovable property, this real estate situated within the jurisdiction of the government of the State of New York, passed by descent from an alien owner to Julia Lynch, not as a citizen of the State of New York, not under any law written or unwritten of that State, but under "a national law," "a common law of the United States," a common law which was all the more potent in its operation for being an unwritten law, because that learned chancellor would hardly have ventured to maintain that the Congress of the United States, by a positive statutory enactment, could have controlled the devolution of title to real property within the several States of the Union.

It was as true at that day as it was when this court pronounced the solemn words in *United States* v. *Fox*, "The title and modes of disposition of real property within the State, whether *inter vivos* or testamentary, are

not matters placed under the control of Federal authority." Such control would be foreign to the purposes for which the Federal Government was created and would seriously embarrass the landed interests of the State.

Article XXXV of the New York constitution of 1777 declared:

> That such parts of the common law of England and of the statute law of England and Great Britain, and of the acts of the legislature of the colony of New York, as together did form the law of the said colony on the 19th of April, 1775, shall be and continue the law of this State, subject to such alterations and provisions as the legislature of this State shall from time to time make concerning the same.

And this court decided, in *Lessee of Levy et al.* v. *McCartee* (6 Pet., 102), that in the State of New York—

> An alien has no inheritable blood, and can neither take land himself by descent nor transmit land from himself to others by descent.

Each of the original thirteen States, I believe, and most of those subsequently admitted into the Union, deemed it necessary, either in their constitutions or by express statutory enactment, to make the common law of England part of their jurisprudence.

Neither in the Constitution of the United States nor by any act of Congress down to the adoption of the fourteenth amendment, was the common law made part of the law of the United States. Yet the learned chancellor found that the United States had a common law, and that by virtue of that common law the land of an alien

in the State of New York passed to another alien as a citizen of the United States.

How this decision has received the approval of the learned judges and jurists who have made it the basis of judicial decision and official action is, in the light of the law as at present understood and applied, altogether inexplicable.

We have imported and adopted into the language of our statutes and judicial decisions many of the terms resulting from and appropriate only to feudalism. This, perhaps, was a necessity growing out of the poverty of English vocabulary.

The terms thus borrowed were used analogically, or as expressing approximately the meaning sought to be conveyed. But now they have risen up to torment us in this, that arguments founded upon the original significance and application of these terms are being urged in support of the insistence that notwithstanding the fact "that all men are created equal, that they are endowed by their Creator with certain inalienable rights. * * * That to secure these rights Governments are instituted among men, deriving their just powers from the consent of the governed"—yet that these men are but liege men to some sovereign power, and acquire and hold their lands subject to the incidents of feudal tenure.

In *Talbert* v. *Jansen* (3 Dall., 140), counsel for appellant in argument said:

> From the feudal system sprung the law of allegiance, which, pursuing the nature of its origin, rests on lands, for when lands were all held of the Crown then the oath of allegiance became appropriate. It

was the tenure of the tenant or vassal. * * * Yet it is to be remembered that, whether in its real origin or in its artificial state, allegiance, as well as fealty, rests upon lands, and it is due to persons. Not so with respect to citizenship, which has arisen from the dissolution of the feudal system and is a substitute for allegiance, corresponding with the new order of things. Allegiance and citizenship differ indeed in almost every characteristic. Citizenship is the effect of compact; allegiance is the offspring of power and necessity. Citizenship is a political tie; allegiance is a territorial tenure. Citizenship is the charter of equality; allegiance is a badge of inferiority. Citizenship is constitutional; allegiance is personal. Citizenship is freedom; allegiance is servitude. Citizenship is communicable; allegiance is repulsive. Citizenship may be relinquished; allegiance is perpetual.

In *Field et al.* v. *Adrian et al.* (7 Md., 214), the court of appeals of Maryland held, in 1854, that—

> A party may not be a citizen for political purposes and yet be a citizen for business or commercial purposes.

A child born upon the soil of England was an English subject (not citizen), because the lord of that soil had the right of wardship and because the tenant, not being governed by his own consent, was not permitted to renounce the allegiance—to break the ligament which bound him to lord and land.

With far more propriety might we claim for bishops and archbishops of our religious communions all the power which was vested in those offices under the hierarchy of the established Church of England. For these, as well as those, were creations of the common law.

HOW, IF AT ALL, HAS THE FOURTEENTH AMENDMENT OF THE CONSTITUTION AFFECTED THIS DOCTRINE OF THE UNITED STATES?

The fourteenth amendment, if ever lawfully adopted at all, was at least adopted *de facto*, on the 21st of July, 1868. It provides:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside.

What was meant by "subject to the jurisdiction thereof?" How may we ascertain what that phrase was intended to express?

Some light, at least, may be derived from the debates to which it gave rise when the subject was before Congress for consideration.

When the joint resolution proposing the fourteenth amendment reached the Senate, Mr. Doolittle offered as an amendment that after the word "thereof," in the first section, the words "excluding Indians not taxed" be inserted. The debate which followed was on that amendment. (Congressional Globe, part 4, 1st sess. 39th Cong., p. 2890.)

> *Mr. Trumbull* (p. 2893). What do we mean by "subject to the jurisdiction of the United States?" Not owing allegiance to anybody else; that is what it means. Can you sue a Navajo Indian in court? Are they in any sense subject to the complete jurisdiction of the United States? * * * Are they subject to our jurisdiction in any just sense? They are not subject to our jurisdiction. We do not exercise jurisdiction over them. It is only those persons

who come completely within our jurisdiction who are subject to our laws that we think of making citizens; and there can be no objection to the proposition that such persons should be citizens.

*Mr. Reverdy Johnson.* Now, all that this amendment provides is that all persons born within the United States and not subject to some foreign power—for that, no doubt, is the meaning of the committee who have brought the matter before us—shall be considered as citizens of the United States. That would seem to be not only a wise but a necessary provision. If there are to be citizens of the United States entitled everywhere to the character of citizens of the United States there should be some certain definition of what citizenship is, what has created the character of citizen as between himself and the United States, and the amendment says that citizenship may depend upon birth, and I know of no better way to give rise to citizenship than the fact of birth within the territory of the United States, born of parents who at the time were subject to the authority of the United States. I am, however, by no means prepared to say, as I think I have intimated before, that being born within the United States, independent of any new constitutional provision on the subject, creates the relation of citizen to the United States.

*Mr. Howard* (p. 2895). I concur entirely with the honorable Senator from Illinois that the word "jurisdiction," as here employed, ought to be construed so as to imply a full and complete jurisdiction on the part of the United States, coextensive in all respects with the constitutional power of the United States, whether exercised by Congress, by the Executive, or by the judicial department; that is to say, the same jurisdiction in extent and quality as applies to every citizen of the United States now.

*Mr. Williams* (p. 2897). I understand the words here "subject to the jurisdiction of the United States" to mean fully and completely subject to the jurisdiction of the United States. If there was any doubt as to the meaning of those words, I think that doubt is entirely removed and explained by the words in the subsequent section; and believing that in any court or by any intelligent person these two sections would be construed not to include Indians not taxed, I do not think the amendment is necessary.

I have not undertaken to repeat the debate, or to do more than introduce here the recognized leaders and the ablest lawyers of the two political parties in Congress, to show from their own language a concurrence of opinion that the words "subject to the jurisdiction thereof" applied to those only who were subject to the complete jurisdiction of the United States in all the departments of its Government; and that it was not to be extended to the children of Chinese parents, who were the subjects of a foreign power; whose residence here was temporary and for purposes of business only; who had left China with the intention of returning and whose stay here, however protracted, was not with the intention of remaining; persons over whom the State and Federal governments exercised no other jurisdiction than they did over the tourist, or the man of business, who remain only until the objects of their visit are fulfilled.

The same Congress, by which the fourteenth amendment to the Constitution was framed and proposed to the States, had already passed the civil rights bill, in the first section of which citizenship of the United States was

defined, and that definition still stands in our statute books. (Sec. 1992 Rev. Stat.)

> All persons born in the United States, and not subject to any foreign power, excluding Indians not taxed, are declared to be citizens of the United States.

"Not subject to any foreign power" is merely the negative of "subject to the jurisdiction of the United States."

No direct decision of this question has ever been made by the Supreme Court of the United States. But language has been employed in several opinions of that court which may be safely accepted as equivalent.

In *Elk* v. *Wilkins* (112 U. S., 94), the question presented was, whether an Indian, born a member of one of the Indian tribes within the United States, which still exists and is recognized as a tribe by the Government of the United States, who has voluntarily separated himself from his tribe and taken up his residence among the white citizens of a State, but who has not been naturalized or taxed, or recognized as a citizen, either by the United States or by the State, is a citizen of the United States within the meaning of the first section of the fourteenth amendment?

Mr. Justice Gray, speaking for a majority of the court, said:

> The main object of the opening sentence of the fourteenth amendment was to settle the question upon which there had been a difference of opinion throughout the country and in this court as to the citizenship of free negroes (*Scott* v. *Sandford*, 19 How., 393); and to put it beyond doubt that all persons, white or black, and whether formerly slaves or

> not, born or naturalized in the United States, and owing no allegiance to any alien power, should be citizens of the United States and of the State in which they reside. (*Slaughterhouse Cases*, 16 Wall., 36–73; *Strauder* v. *West Virginia*, 102 U. S., 303–306.)
>
> This section contemplates two sources of citizenship, and two sources only—birth and naturalization. The persons declared to be citizens are "all persons born or naturalized in the United States and subject to the jurisdiction thereof." The evident meaning of these last words is not merely subject in some respect or degree to the jurisdiction of the United States, but completely subject to their political jurisdiction and owing them direct and immediate allegiance.

In the *Slaughterhouse Cases* (16 Wall., 73), Mr. Justice Miller, delivering the opinion of the court, speaking of the fourteenth amendment, said:

> That its main purpose was to establish the citizenship of the negro can admit of no doubt. The phrase "subject to its jurisdiction" was intended to exclude from its operation children of ministers, consuls, and citizens or subjects of foreign states born within the United States.

Aliens temporarily in this country are in a certain sense and to a certain extent subject to its jurisdiction. They must obey its laws, must keep the peace, must injure no one in person or property, must pay their debts—but they can not be placed upon juries, or made to work the public roads, or bear many of the burdens which rest upon him who is subject to the complete jurisdiction of the United States. So, too, they are not eligible for office or to positions of trust and confidence in either of the three great departments of the Government.

The citizenship of Chinese infants is inconsistent with the whole policy of the United States as declared by the acts of Congress.

Dr. Wharton says (2 International Law Digest, sec. 197):

> Chinese also are not citizens in the contemplation of the fourteenth amendment, since they are not capable of naturalization under our system.

By the *Act of May 6, 1882*, section 14 (22 St., 61), it is provided:

> That hereafter no State court, or court of the United States, shall admit Chinese to citizenship.

The same act provides (sec. 1):

> That from and after the expiration of ninety days next after the passage of this act, and until the expiration of ten years next after the passage of this act, the coming of Chinese laborers to the United States be, and the same is hereby, suspended; and during such suspension it shall not be lawful for any Chinese laborer to come, or, having come after the expiration of said ninety days, to remain within the United States.

Section 4 provides as to Chinese laborers who were in the United States on the 17th of November, 1880, that they may go from and come to the United States after they have been properly listed and have received certificates provided for in the act.

Section 9 provides that no Chinese laborer shall be permitted to land without first producing his certificate.

The petitioner here, it is agreed, was a Chinese laborer at the time of his attempt to land in August, 1895. But he was born in 1873, and, consequently, on the 17th of

November, 1880, was but 7 years of age, and could not, therefore, claim the privileges extended under section 4 of that act to Chinese persons who in 1880 were laborers.

Dr. Wharton says:

> The term "subject to jurisdiction" must be construed in the sense in which the term is used in international law, as accepted in the United States as well as in Europe. And by this law the children born abroad of American citizens are regarded as citizens of the United States with the right, on reaching full age, to elect one allegiance and repudiate the other, such election being final. (Conflict of Laws, sec. 10.)

Section 1977, Revised Statutes, provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons or property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind and to no other.
>
> SEC. 1978. All citizens of the United States shall have the same right in every State and Territory as is enjoyed by white citizens thereof, to inherit, purchase, lease, sell, hold, and convey real and personal property.

The constitution of Massachusetts (Art. IV, part first) provides:

> The people of this Commonwealth have the sole and *exclusive right* of governing themselves, as a free,

sovereign, and independent State; and do, and forever hereafter shall, exercise and enjoy every power, jurisdiction, and right which is not, or may not hereafter be, by them *expressly* delegated to the United States of America in Congress assembled.

The oath of office prescribed in chapter 6 of the constitution of Massachusetts was:

> I, A. B., do truly and sincerely acknowledge, profess, testify, and declare that the Commonwealth of Massachusetts is, and of right ought to be, a free, sovereign, and independent State; and I do swear that I will bear true faith and allegiance to the said Commonwealth. * * * I do renounce and abjure all allegiance, subjection, and obedience to the King, Queen, or Government of Great Britain and every other foreign power whatsoever; and that no foreign prince, person, prelate, state, or potentate hath or ought to have any jurisdiction, superiority, preeminence, authority, dispensing or other power, in any matter, civil, ecclesiastical, or spiritual, within this Commonwealth, *except* the authority and power which is or may be vested by their constituents in the Congress of the United States.

What is the virtue of "except?"

No foreign prince, person, prelate, state, or potentate, *except* the Congress of the United States?

Has Massachusetts in her sovereignty, here so solemnly declared, no power to regulate and control the transmission of title to real estate within her jurisdiction? Has she no power to define the jurisdiction and prescribe the rules of pleading and evidence for her own courts? Yet, how can such power consist with the powers granted in sections 1977 and 1978 of the Revised Statutes of the United States?

Chinese persons are denied admission into the United States. They are prohibited from naturalization; and yet, under these two sections, Congress has assumed to grant to them within the State of Massachusetts all the rights and privileges which the citizens of that great Commonwealth enjoy under their constitution. If the United States by its acts excluding Chinese persons has thus declared them unfit for citizenship within the United States, may not Massachusetts in like manner exclude them from her jurisdiction and deny to them the right to acquire or hold real estate within her limits?

Has she not denied in the past, if she does not now, to all aliens the right and power of holding real estate in her territory? Yet, if the decision of the court below is sound, and this Chinese native of California is, in virtue of his birth, a citizen of the United States, then, under section 1978, Revised Statutes, he may "purchase, lease, sell, hold, and convey real and personal property" in the State of Massachusetts, her constitution and laws to the contrary.

The United States existed before "the more perfect union" was formed by the present Constitution. The citizens of each of the several thirteen States constituted those States, respectively; and yet the present Constitution of the United States, in its preamble, does not say "We, the citizens of the United States," but "We, the people of the United States."

In *Penhallow et al.* v. *Doane's Admrs.* (3 Dall., 92), Mr. Justice Iredell said:

> It never was considered that before the actual signature of the articles of confederation a citizen

of one State was to any one purpose a citizen of another. He was to all substantial purposes as a foreigner to their forensic jurisprudence. If rigorous law had been enforced, perhaps he might have been deemed an *alien* without an express provision of the State to save him.

Only by virtue of the Constitution alone is it that—

> The citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States.

How easy would it have been to have covered the whole ground by the declaration that "all the citizens of the United States shall have equal privileges and immunities in every State."

Doubtless the people of the United States have the same power to amend their Constitution of government which they exercised when that Constitution was ordained and established.

If it escaped the inspired sagacity of the framers of that immortal instrument to discern, and remained for the superior virtue and intelligence of the sublime patriots of the reconstruction era to discover, the necessity for a citizenship of the United States—a national citizenship—the power was theirs to propose and with the people to approve and adopt.

It is true, as to the fourteenth amendment, that its adoption, so far as the ten Southern States were concerned, was of something more than doubtful validity,[1]

[1] In his Constitutional History of the United States (vol. 2, p. 376 et seq.), Mr. George Ticknor Curtis says:

"What Congress could constitutionally do in 1867 was to propose the fourteenth amendment to the legislatures existing at the

the votes of those States being made by the express terms of the law a condition precedent to the enjoyment and exercise of their right to representation in the Government by which they were taxed, which derived its just powers from the consent of the governed.

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time in several States; and in each of the Southern States there was a legislature just as well as there was in every other State. Any species or form of compulsion exerted by the Federal Government to coerce the people of any Southern State into the adoption of the amendment was precisely the same kind of usurpation that it would have been in any other State if such compulsion had been used in any other. Perfect freedom in the adoption or rejection of any amendment is a fundamental right of every State implied in the framework of the amending power.

"But Congress in 1867 did not see fit to pursue the constitutional course. It adopted a method of proceeding in ten States that was entirely aside from the Constitution, and that was at variance with the method of proceeding in all the other States. In the latter no coercion of any kind was used and none would have been tolerated. In the former, the reconstruction acts, which applied only to those ten States, set aside the existing State governments and provided for the formation of a new government in each of them, to be created by a convention of delegates elected by the male citizens of the State 21 years old and upward, of whatever race, color, or previous condition, who had been resident in the State for one year previous to the day of such election. One government which was certain to reject the proposed amendment was deposed to make room for another government which would certainly ratify it. This was done by a process which came to be called reconstruction. It was a process that could not be applied to all the States alike, and for this reason, even if there had been no other, it was not within the scope of the amending power. That power never contemplated action upon an amendment by any bodies excepting the 'legislatures' or 'conventions' in the several States.

"It will presently be seen that in six States the bodies which were counted officially as among the ratifying bodies were neither 'legislatures' nor 'conventions' in the sense of the Constitution.

That amendment declares that all persons born within the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside.

In order that Wong Kim Ark may become a citizen

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They were bodies organized for the express purpose of bringing about a seeming ratification. This is a blot on our constitutional history which no writer can omit to notice. The framers of the reconstruction acts probably gave very little thought to the article of the Constitution which embraces the amending power. If they considered it at all, they made it read as if it had empowered two-thirds of both Houses whenever it should appear that a proposed amendment was not likely to be ratified by the legislature of any State to take measures to constitute a new legislature which would be certain to ratify it. Congress in 1867 was a body long accustomed to the sound of the doctrine that powers must be exercised without looking for them in the Constitution. Apparently they did not regard the process of reconstruction as warranted by the Constitution, for the object to be accomplished in the Southern States required the creation of a new sovereign people in each of them.

"Although the last clause of the fourteenth amendment authorized Congress to enforce its provisions by appropriate legislation, it could only be after the amendment had been duly ratified and had become part of the Constitution that this power of enforcing its provisions could be resorted to. The power did not embrace an authority to subvert the sovereignty of any State by such a process as that of the reconstruction acts. Those acts were not such an enforcement of the provisions of the amendment as the amendment itself contemplated. Its provisions could be enforced after, but not before, it had become part and had been officially proclaimed to be a part of the Constitution.

"Resuming now the thread of the narrative, it is to be noted that the fourteenth amendment, proposed on the 16th of June, 1866, had not been acted on when the reconstruction acts were passed. When it was acted on by the States there were thirty-seven States in the Union, and the mode in which the Secretary

of the United States under this amendment of the Constitution, it must appear that he was, at the moment of his birth, subject to the jurisdiction of the United States.

It is agreed that his parents were, at that moment, subject to the jurisdiction of the Emperor of China.

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of State proclaimed the result throws a very strong light on the nature of the proceeding in six of the States, namely, Delaware, Maryland, Virginia, North Carolina, South Carolina, and Georgia. Mr. Seward, a cautious statesman, was Secretary of State under President Johnson, as he had been under President Lincoln. It was his official duty, under an act of Congress passed April 20, 1818, to certify whether an amendment had, by being duly ratified, become a part of the Constitution.

"His proclamation bearing date the 20th of July, 1868, declared that from official documents on file in his Department, the fourteenth amendment had been ratified by the 'legislatures' of the States of Connecticut, New Hampshire, Tennessee, New Jersey, Oregon, Vermont, New York, Ohio, Illinois, West Virginia, Kansas, Maine, Nevada, Missouri, Indiana, Minnesota, Rhode Island, Wisconsin, Pennsylvania, Michigan, Massachusetts, Nebraska, and Iowa (23 States), and that in the six States of Arkansas, Florida, North Carolina, Louisiana, South Carolina, and Alabama it had been ratified '*by newly constituted and established bodies avowing themselves to be and acting as the legislatures respectively*' of those States.

"This remarkable difference in the language used to describe the two groups of the ratifying bodies was designed. The Secretary could not affirm that the 'newly constituted and established bodies' in the six States were the 'legislatures' of those States. He could only describe them as bodies 'avowing themselves to be and acting as the legislatures of those States respectively.'"

In a note by the editor, it is added:

"Secretary Seward in his proclamation had to notice another doubtful question in regard to the ratification of two States, each of which had a legislature that was both a *de jure* and a *de facto* one. These were Ohio and New Jersey. It appeared from the official papers of those States on file in the State Department that after having ratified the amendment the legislatures of those

They could not in the same sense and to the same extent be subject to the jurisdiction of the United States, for no man in a political, any more than in a moral, domain can serve two masters. He may and must, when in a foreign jurisdiction, obey the divine injunction of the Master and "render unto Cæsar the things that are Cæsar's."

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States had passed resolutions 'respectively withdrawing the consent of those States to the aforesaid amendment.' This, in the judgment of the Secretary, made it 'a matter of doubt and uncertainty whether such resolutions are not improper, invalid, and ineffectual for withdrawing the consent of the said two States, or either of them, to the aforesaid amendment.' Putting the result, therefore, hypothetically, the Secretary certified that, '*If* the resolutions of the legislatures of Ohio and New Jersey ratifying the aforesaid amendment are to be deemed as remaining of full force and effect, notwithstanding the subsequent resolutions of those States, which purport to withdraw the consent of those States from such ratification, *then* the aforesaid amendment has been ratified in the *manner heretofore mentioned*, and *so* has become valid to all intents and purposes as a part of the Constitution of the United States.'

"The requisite three-fourths of all the States in the Union was thus made up by counting the ratifications given by the six Southern States through bodies claiming to be 'legislatures' as valid and by adding thereto the ratifications of Ohio and New Jersey in order to make up the requisite number of twenty-nine States. If this mode of ratifying an amendment to the Constitution shall hereafter be regarded as a precedent, a construction will be put upon the amending power widely at variance with its terms and purpose. But, in truth, the whole process was one outside of the scope of the amending power, and it must necessarily be that when such a process of amendment is resorted to it must depend on future events, whether an amendment thus purporting to have been adopted is to be regarded as having become valid under the principles of public law, which are deemed to cure irregularities in and departures from the legal and constitutional method of public action."

But we have seen that this court, as well as the Executive Departments of the Government, have solemnly construed this clause of the amendment to mean, not partially or in a limited sense, but fully and completely, subject to the jurisdiction. The domicile of the parent is the domicile of the child. Their people are his people. Wherever they go he goes, and a law of this Government prohibiting citizens of the United States to leave our shores and commanding all Chinese persons or subjects to depart at once under penalty of death, would not be construed so as to operate the result of tearing a Chinese infant from its mother's breast and detaining it here as a citizen of the United States while the mother was banished as an alien and a foreigner from our coasts; and yet this would be the logical result of the construction given to this language by the decree from which this appeal was taken.

HOLMES CONRAD,
*Solicitor-General.*